No. 83-972

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

RICHARD B. OGILVIE, Trustee Of The Property Of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, BURLINGTON NORTHERN, INC., and the UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RICHARD B. OGILVIE, TRUSTEE, AND BURLINGTON NORTHERN, INC.

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Date: February 18, 1984

Pandick Midwest Inc., Chicago, Illinois • 454-7600

QUESTIONS PRESENTED:

In the opinion of the Trustee and BN* the following questions are presented by the RLEA's petition:

1. Does the traditional and broad discretion of a railroad reorganization court to defer payment of claims against a railroad in reorganization allow deferral of *New York Dock*** labor protection claims during the reorganization?

2. Did the Milwaukee railroad reorganization court have the authority, under legislation which specifically empowered it to provide for the protection of employees affected by sales of Milwaukee railroad properties, to interpret, at the request of affected employees, an arrangement made among purchasing carriers, the Trustee and their employees for the protection of employees affected by sales of Milwaukee railroad properties?

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* "Trustee" refers to the Respondent Richard B. Ogilvie, Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor, and "BN" refers to Respondent Burlington Northern, Inc.

** See p. 4, *infra*

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Respondents Richard B. Ogilvie ("Trustee"), Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Burlington Northern, Inc. ("BN"), respectfully request that this Court deny Petitioner Railway Labor Executives' Association's ("RLEA") petition for a writ of certiorari in the above proceeding.

OPINIONS BELOW AND JURISDICTION

The Trustee and BN adopt those portions of the Petition entitled "Opinions Below" and "Jurisdiction."

STATUTES INVOLVED

The Trustee and BN adopt that portion of the Petition entitled "Statutes Involved," but add that this case involves questions concerning the discretion of a United States District Court sitting as a Railroad Reorganization Court under Section 77 of the Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205 (1976) (repealed effective 1979). Relevant portions of this statute are reproduced in Appendix A hereto.

STATEMENT OF THE CASE

I. The Milwaukee Road Bankruptcy.

After incurring losses of over $100,000,000 in 1975 through 1977, the Milwaukee Road[1] entered reorganization on December 19, 1977.[2] In 1978, the Milwaukee lost $82 million from operations and was losing money at twice that level in 1979, maintaining operations by borrowings under Section 77(c)(3). By the Fall of 1979, both the United States Court of Appeals for the Seventh Circuit[3] and the Reorganization Court[4] had determined the Milwaukee to be cashless,[5] restricted

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[1] The Chicago, Milwaukee, St. Paul & Pacific Railroad Company shall hereinafter be referred to as "Milwaukee" or "Milwaukee Road;" the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Thomas R. McMillen presiding in case No. 77 B 8999 as the "Reorganization Court;" Chapter VIII of the Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205 (1976) (repealed effective 1979) as "Section 77;" The Milwaukee Railroad Restructuring Act, 49 U.S.C. §§ 901-22 (Supp. III 1979) as "MRRA"; orders of the Reorganization Court as "Orders" and *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 611 F.2d 662 (7th Cir. 1979) as "*Embargo Decision.*"

[2] The Milwaukee Road reorganization proceeding continues to be governed by Section 77, with certain modifications not pertinent to this Petition. Pub. L. No. 95-598 § 403, 92 Stat. 2682 (Nov. 6, 1978).

[3] *Embargo Decision* at 669-70.

[4] Order No. 220 C, Appendix B to Brief of Trustee and BN at 11b.

[5] *See In re Penn Central Transportation Co.*, 384 F. Supp. 895, 919 n. 31 (Sp. Ct. R.R.R. Act 1974) (defining "cashlessness").

borrowings[6] to a potentially reorganizable core and embargoed operations on non-core lines, including the lines ultimately sold to BN and Union Pacific ("UP") as of November 1, 1979.[7] Employees working on these non-core lines and operations were "furloughed"—that is, they were laid off without any further pay and without any employee protection.[8]

II. The Milwaukee Railroad Restructuring Act, the Section 9 Agreement, and the March 4 Agreement.

The embargo was only a partial expedient. The Milwaukee's service obligations had to be formally "abandoned" and the Trustee's responsibilities required him to seek to sell embargoed lines for continued operation whenever possible. At the time of the embargo, abandonments of service by railroads and sales of lines for continued operation required lengthy proceedings before and approval by the Interstate Commerce Commission ("ICC").[9] In addition, protections for employees affected by the transactions were required.

Protections required by the ICC in abandonments and sales vary to fit the circumstances.[10] *See, e.g., New York Dock Railway* v. *United States*, 609 F.2d 83, 91-92 (2d Cir. 1979) (upholding imposition of wages and fringe benefits for up to six years but noting that benefits may vary); *Wellsville, Addison & Galeton Railroad Corp.,—Abandonment*, 354 I.C.C. 744 (1978) (no protection).

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[6] Section 77(c)(3).

[7] Order No. 220 C, Appendix B to Brief of Trustee and BN at 12b.

[8] *Id.*

[9] Section 77(o); Interstate Commerce Act, 49 U.S.C. §§ 10903-06 and 11351 (Supp. III 1979).

[10] 49 U.S.C. § 11347 governs labor protection in sales. By virtue of § 11341, the Commission's duty under § 11347 to provide protection is exclusive. 49 U.S.C. § 11341. Abandonments other than those governed by special statutes, such as MRRA, are carried out under 49 U.S.C. § 10903 (Supp. III 1979). Section 10903(b)(2) requires protective conditions at least as beneficial to the interest of employees as those established under § 11347.

In typical abandonments, *"Oregon Short Line"*[11] conditions are imposed. These provide for maintenance of an employee's wage and benefit levels for a period of up to six years as well as certain other benefits. Estimates of *Oregon Short Line* claims which would arise out of the abandonment of all Milwaukee non-core operations varied from $300 million to $1.2 billion with the most likely estimate being $350 million. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 658 F.2d 1149, 1156 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). This liability would have precluded any attempt to reorganize any part of the railroad, *id.*, and payments to employees for labor protection would have been delayed while the question of their validity was litigated through the courts. *Id.* Neither the public interest in continued rail service nor the interest in protecting rail employees from the hardships of being laid off would have been served.

In typical sales *"New York Dock"*[12] protections are given employees of the selling and purchasing carrier. These are equivalent to *Oregon Short Line* protections for employees of both the purchasing and selling carriers. The existence of these potentially great costs was interfering with the Trustee's efforts to sell lines to other railroads for continued operation.

In late 1979, Congress passed the MRRA. Sections 5, 9, and 17 of the MRRA, 45 U.S.C. §§ 904, 908 and 917, provide opportunities for the negotiation of alternate labor protection agreements to facilitate reorganization and sale efforts while providing adequate protections for employees. Two such agreements were negotiated. The "Section 9 Agreement" was negotiated between the Trustee and representatives of the Milwaukee Road's labor unions. It provides affordable and immediately payable benefits of up to $25,000 to Milwaukee Road employees adversely affected by restructuring activities

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[11] *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

[12] *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

who do not wish to await payment of New York Dock Benefits pending the reorganization process. The "March 4 Agreement", Appendix E to Petition, was negotiated between the Trustees of the Milwaukee Road and the Chicago, Rock Island and Pacific Railroad, their labor unions, and other railroads, including BN and UP, potentially interested in acquiring lines of the Milwaukee Road or the Rock Island under Section 5 or 17 of the MRRA. Those sections require employee protection as beneficial as that provided under 49 U.S.C. § 11347. Section 11347 in turn provides that "the [labor protection] arrangement may be made by the rail carrier and the authorized representative of its employees."

The March 4 Agreement established the total employee protection responsibility for any carrier purchasing property from the Milwaukee. It was expressly made "pursuant to the Milwaukee Railroad Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.)" Appendix E to Petition at 31a, and it contained specific provisions establishing the nature of the income protection arrangements for existing employees of purchasing carriers as well as for newly hired employees formerly working for the Milwaukee or Rock Island railroads.

With regard to existing employees of the purchasing carriers, the March 4 Agreement provided a "monthly compensation guarantee" for three years at 80% of their previous average earnings. In addition, it provided that the "monthly compensation guarantee" would "*only*" be provided "to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and *to its own employees* who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs." *Id.* at 37a (emphasis added).

The compensation guarantee for a purchasing carrier's employees was limited to those working in the seniority districts where properties were acquired because they were the employees who were most likely to be affected by purchases. The exclusion of other employees from the protection arrangement was consistent with the substantially reduced protection for the existing employees who were most likely to be affected by the purchases.

III. The Sales.

In March of 1980 the Milwaukee agreed to sell to BN 30 parcels of tracks and yards involving about 400 miles of track for $21 million. The Trustee also agreed to sell to UP eight yard and track segments for about $19 million. All of this railroad property had previously been abandoned under Section 5(a) of the MRRA, 45 U.S.C. § 904(a). The Reorganization Court gave its preliminary approval to each sale and authorized the carriers, pursuant to Section 5(b)(3) of the MRRA, to operate the properties pending ICC approval.

BN's application to the ICC for approval of its purchase listed each location where any change in the level of employment had or would occur as a result of the purchase. No positions were reported as being "consolidated," "transferred" or "abolished" as a result of the transaction. In addition, the application presented the March 4 Agreement to the ICC and stated that "under the March 4, 1980 Labor Protective Agreement (March 4 Agreement) BN employees in active service in zones or districts where former Milwaukee personnel are employed for additional job assignments will be the beneficiaries of a monthly compensation guarantee."

The ICC approved the purchase application in an order issued on August 21, 1980. *Burlington Northern Inc.*—

Purchase, 363 I.C.C. 298 (1980). The ICC referred to the March 4 Agreement and found that "the interest of Railway Labor will be adequately protected with regard to the BN and UP purchases." *Id.* at 312. The ICC also referred to the authority of the Reorganization Court under MRRA to impose employee protection conditions, but it did not condition its approval on additional protection to employees, nor did it recommend or suggest that additional protection be provided.

Initially upon approving the sales involved in this case, the Reorganization Court found that the Trustee's obligation to Milwaukee employees was controlled by its Orders in the abandonments of the lines sold and that labor protection was not required under the MRRA for employees of the acquiring carriers. Order No. 409, Appendix B-2 to Petition.

The RLEA appealed that order to the Seventh Circuit in Case No. 80-2735. The parties then agreed to a limited remand of that appeal for purposes of reconsidering Order 409 as it dealt with employee protection. 7th Cir. No. 80-2735 Order dated May 26, 1981.

As the parties had done when the matter was first before the Reorganization Court, BN maintained that the March 4 Agreement was designed to state the purchasing carrier's complete employee protection responsibility while RLEA maintained that the Agreement was not a complete agreement and that it did not intend to exclude employees working outside of purchase zones from protection. RLEA was accorded an evidentiary hearing and it introduced an affidavit as to the intent and effect of the March 4 Agreement.

At no time in either proceeding before the Reorganization Court in which the intent and scope of the March 4 Agreement was in issue did RLEA suggest that the Reorganization Court did not have the jurisdiction to resolve that question or that arbitration should be used.

Upon reconsideration of Order 409, the Reorganization Court provided New York Dock protections for the benefit of Milwaukee Road employees, with certain modifications not at issue in this petition. *See,* Order 409-A Appendix to Petition at 2a (adopting conditions in Appendix B of the Special Master dated February 20, 1980. These conditions are New York Dock type of protections.) The Reorganization Court also adopted the labor-protection benefits of the March 4 Agreement for Milwaukee, BN and UP employees working in the seniority districts in which the lines sold were located. In addition the Reorganization Court found that BN and UP employees not working in the seniority districts of the lines sold were excluded from protection under the March 4 Agreement. The Reorganization Court, as it had previously deferred payment of Oregon Short Line claims in approving abandonment of these lines, deferred payment of the New York Dock Benefits to a later date. See *In Re Chicago, Milwaukee,* 658 F.2d 1149, at 1156-60.

The RLEA appealed the findings (1) that BN and UP employees not working in the seniority districts of the lines sold were excluded from protection and (2) that payment of New York Dock Benefits to Milwaukee employees be deferred. The Court of Appeals for the Seventh Circuit affirmed the judgment of the Reorganization Court. *In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* Nos. 80-2735, 82-1637 (July 15, 1983), Appendix C to Petition.

REASONS FOR DENYING THE WRIT

I. Deferral Of Payment Of New York Dock Benefits

A. Deferral Does Not Conflict With Decisions Of This Or Any Other Court.

The Reorganization Court's deferral of payment of New York Dock benefits was an exercise of its discretion under Section 77 and the Seventh Circuit affirmed the deferral as an exercise of that discretion. Appendix E to Petition at 18a. This Court has consistently recognized that a railroad reorganization court has unusually broad discretionary powers over the conduct of the reorganization proceeding and the conduct of the bankrupt railroad's business in order to bring about reorganization of a railroad as a viable enterprise. *See, e.g., Continental Illinois National Bank & Trust Co.* v. *Chicago Rock Island & Pacific Railway Co.*, 294 U.S. 648, 675-76 (1935) ("*Continental Bank*"). This Court and courts of appeals have consistently recognized that payment of claims extant at the time the petition for reorganization is filed may be deferred. *Id.* at 676-77; *In re Boston and Maine Corp.*, 600 F.2d 307, 310-13 (1st Cir. 1979). Courts have also consistently recognized that payment of claims arising after the petition is filed may be deferred in the interest of the reorganization, including those with cost of administration status. *See, e.g., In re Penn Central Transportation Co.*, 553 F.2d 12, 16 (3d Cir. 1971), (payment of current taxes); *In re Penn Central Transportation Co.*, 400 F.Supp. 920, 925-26 (E.D. Pa. 1975) (operating expenses). *Cf. In re Penn Central Transportation Co.*, 484 F.2d 1300, 1304-05 (3d Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (reduction of unfunded pension liability upheld as an equitable exercise of court's discretion).[13] Clearly, the decision below is

[13] The only area where there is some dispute as to the discretion of the Reorganization Court is in the area of interline per diem account settlements. *Compare In re Chicago, Rock Island & Pacific Railroad Co.*, 537 F.2d 906 (7th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977) with *In re Boston & Maine Corp.*, 600 F.2d 307 (1st Cir. 1979).

consistent with the only other decision on the deferability of labor protection benefits—that of the Seventh Circuit previously in this proceeding. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 658 F.2d 1149, *cert. denied*, 455 U.S. 1000 (1982).

In short, the Seventh Circuit's decision is consistent with the decisions of this and other courts. There is no need for this Court to review the decision to resolve a conflict between courts.

B. This Case Does Not Present An Important Question Of Law Which Should Be Decided By This Court.

Almost exactly two years ago this Court was asked by RLEA to review the deferral of payment of traditional labor protection claims in connection with large scale abandonments of Milwaukee Road lines. Thousands of employees, hundreds of millions of dollars in claims, and the possibility of reorganization of the Milwaukee Road at all were at stake. While the authority of a reorganization court to defer payment of claims, was clearly established, the MRRA was a new and uninterpreted law, and the issue of deferral of payment of labor protection was a novel one. Yet this Court, properly, declined to review the rulings below. *RLEA* v. *Ogilvie*, 455 U.S. 1000 (1982).

The factual and legal issues involved have, if anything, become less important since then.[14] The reorganization of the

[14] The only change in the legal setting is this Court's decision invalidating provisions of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1005 and 1008, as a non-uniform bankruptcy law. *RLEA* v. *Gibbons*, 455 U.S. 457 (1982). Those sections provided labor protection to former employees of the Rock Island. It is the Trustee's position that the MRRA, unlike the RITA, is

(Footnote continued on next page)

Milwaukee Road is drawing to a close, as are the few other railroad reorganizations still ongoing under Section 77. The few employees with deferred claims are likely to be paid starting in 1985, which would make any decision advisory. Section 77 has been repealed and the MRRA only applies in Section 77 reorganizations. If similar circumstances should arise in a subsequent railroad reorganizations, the statutory context will be different. Therefore this case would have little precedential value. No purpose would be served by consideration by this Court.

C. The Writ Should Not Be Granted Simply To Review the Reorganization Court's Exercise Of Its Discretion.

RLEA concedes that the Reorganization Court had the discretion to defer payment, but argues that it should have come to a different conclusion in exercising its discretion. Thus what the RLEA is really asking this Court to do is to substitute its judgment for that of the courts below. Petition at 20. The RLEA would have this Court review the facts and history of this case and substitute its judgment for that of the courts below. This is not sufficient reason for granting a writ of certiorari, particularly as there is no real dispute as to the factual finding in this case. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court stated in *Continental Bank* at 677:

> a claim [by creditor] that injurious consequences will result . . . may not, of course, be disregarded by the district court; but it represents a question addressed not to the

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(Footnote continued from preceding page.)

a valid law under the Commerce Power. However, this appeal does not involve the sections of the MRRA providing labor protection to Milwaukee Road employees, it involves the discretion of the Reorganization Court under Section 77 to defer benefits arising out of the Interstate Commerce Act. Therefore, the uniformity of the MRRA is not at issue.

power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.

This is not a case for such interference.

II. March 4 Agreement.

RLEA also states that certiorari should be granted because the Court of Appeals and the lower court erred when they interpreted the March 4 Agreement[15] RLEA says that the

[15] RLEA suggests, but does not raise as an issue worthy of certiorari, that the Reorganization court's interpretation of the March 4 Agreement as intentionally excluding employees working outside of purchase zones was incorrect. For the reasons stated in the Court of Appeals' opinion, the interpretation was clearly correct.

RLEA also implies that the result below was inconsistent with the requirement of Section 5(b)(1) that employee protections imposed by the court be at least as protective of the interests of employees as that required under Section 11347 of the Interstate Commerce Act. 49 U.S.C. § 11347. However, under Section 9 of the MRRA as well as under Section 11347, labor organizations may enter into agreements which differ from the Section 11347 terms which would be imposed absent an agreement. The last sentence of Section 11347 provides that alternative protection "may be made by the rail carrier and the authorized representative of its employees . . . notwithstanding . . .". the substantive protection terms provided by the section. Indeed, it was under this provision that RLEA agreed to accept in the March 4 Agreement substantially less than Section 11347 protection for employees working in the territorial zones where purchases were made. RLEA does not assert here, and it did not assert below, that the March 4 Agreement does not fully comply with the requirements of Section 5(b)(1) of the MRRA with regard to these BN employees working in the territorial zones where purchases were made. RLEA did not challenge that protection arrangement even though it conceded that the protection provided for those employees is "less than one half of the economic protections mandated as a minimum under Section 11347." Brief for Appellant, RLEA at 21 (filed in this case in the Court of Appeals, No. 80-2735). RLEA stated that "Section 11347 of the Interstate Commerce Act, and *a fortiori* Section 5(b)(1) of the MRRA, gives labor and management the power to make such

(Footnote continued on next page)

"Reorganization Court's foray into the area of interpreting Railway Labor Act agreements improperly usurped the exclusive jurisdiction of adjustment boards under the Railway Labor Act. . . ."

This argument, which RLEA made for the first time in the Court of Appeals, does not justify a grant of certiorari for two reasons:

1. The argument is plainly wrong. The March 4 Agreement was not simply a Railway Labor Act agreement. It found its source, purpose and authority in the MRRA, the Interstate Commerce Act and the unique circumstances of the Milwaukee reorganization. The March 4 Agreement states that it was made "pursuant to the Milwaukee Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.)" and makes no reference to the Railway Labor Act. If its interpretation and enforcement were not subject to the jurisdiction and control of the Reorganization Court, the purposes of the MRRA would be defeated. Unlike the typical Railway Labor Act agreement, agreements made pursuant to the MRRA must satisfy the broader requirements and purposes of that Act. Thus, the Reorganization Court is given the express authority to impose the agreement for protection of employees affected by sales of Milwaukee properties—an authority which logically and necessarily includes the authority to interpret protection agreements. Section 5(b)(1) provides:

(Footnote continued from preceding page.)

an agreement in lieu of Section 11347's statutory minimums, for the second sentence of Section 11347 provides: 'Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees.' The March 4 Hiring Agreement was entered into under that provision. . . ." *Id.* at 22.

> In authorizing any such sale or transfer, *the court* shall provide a fair arrangement at least a protective of the interests of employees as that required under section 11347 of title 43 of the United States Code. (emphasis added)

Moreover, as the Court of Appeals correctly found, arbitration under the Railway Labor Act is a notoriously long and drawn out process[16] and, in these circumstances, a process which would provide less rather than more expertise in resolving the dispute. The Reorganization Court is intimately involved in every aspect of the Milwaukee operations, including its labor obligations.

Finally, because the ICC has "exclusive" jurisdiction over labor protection agreement made under Section 11347 (see 49 U.S.C. § 11341) the Reorganization Court must have the same authority with regard to labor protection agreements within its jurisdiction. Section 904 of the MRRA transferred the ICC's responsibilities for labor protection to the Reorganization Court and although the ICC's may defer the resolution of employee protection contract disputes to arbitration boards, it has the ultimate power to resolve these disputes. The ICC's exclusive authority under Sections 11347 and 11341 (formerly Sections 5(2)(5) and 5(11)) supersedes the processes of the Railway Labor Act. *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Rwy. Co.*, 314 F.2d 424 (8th Cir. 1963). See also *Norfolk and Western Railway Company* v. *Nemitz*, 404 U.S. 37 (1971) and *Anderson* v. *United Transportation Union*, 557 F.2d 165, 169 (8th Cir. 1977). There is no authority which holds that an arbitration board has exclusive jurisdiction over labor protection agreements made pursuant to Section 11347 and that the Commission has no subject matter jurisdiction.

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[16] As RLEA well knows, there is a large backlog even in the specially created public law boards established pursuant to the 1966 amendments to the Railway Labor Act. In fact, the National Mediation Board notified all neutral referees appointed to such boards to terminate all compensable service at one point last year when federal funding ran out.

2. The question raised by RLEA is not a significant one and it will not recur. The MRRA was passed to deal with the special circumstances of the Milwaukee and Rock Island reorganizations. The question of the power of the reorganization court to interpret the March 4 Agreement under the MRRA is not likely to recur. Moreover, the substantive result would not change even under RLEA's erroneous view of the narrow limits of the court's jurisdiction—the March 4 Agreement clearly did not contemplate that additional, full *New York Dock* protection would be available to the set of BN employees who were least likely to be directly affected by the purchase.

CONCLUSION

For the above reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

A. Richard B. Ogilvie as Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor.

Prior to reorganization proceedings, the Chicago Milwaukee Corporation was the parent of the Debtor owning approximately 96% of its common and preferred stock. The Trustee is vested with title to the assets of the Milwaukee Road and is empowered to operate its business and otherwise deal with its assets and properties, subject to the jurisdiction of the Reorganization Court. It is the Trustee's opinion that Chicago Milwaukee Corporation and its subsidiaries are neither parent nor affiliates because the Property of the Milwaukee Road is controlled by the Trustee and the Reorganization Court rather than Chicago Milwaukee Corporation.

B. Burlington Northern, Inc. has no parent companies, affiliates or subsidiaries other than wholly owned subsidiaries and New Mexico and Arizona Land Company.

APPENDIX B

STATUTES AND UNPUBLISHED OPINIONS RELIED UPON

BANKRUPTCY ACT OF 1898, 11 U.S.C. § 205 (1976)

[relevant subsections thereof set forth below.]

§ 205. Reorganization of railroads engaged in interstate commerce

(a) Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property

Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof. The petition shall be accompanied by payment to the clerk of a filing fee of $150. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive

jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor". Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in

which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 per centum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation. The corporation shall, within ten days after such service, answer the petition. If the answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this title or in any State or United States court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subdivision (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

(b) Plan of reorganization, contents; "securities," "stockholders," "creditors," "claims" defined; suspension of statutes of limitation

A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probably prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or

waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this title, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity

of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subdivision (p) of this section. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) Proceedings after approval of petition; orders of State regulatory bodies

After approving the petition:

. . . .

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal.

The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracks, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subdivision (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee,

the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20a of title 49, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties, debts or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of author-

izing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(o) Abandonment or sale of lines or property

The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest; and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subdivision at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be

equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY *Debtor.*	In Proceedings for the Reorganization of a Railroad No. 77 B 8999

ORDER No. 220C

In accordance with Order No. 220A dated September 27, 1979, this Court's decision dated the same date, and the decision of the Court of Appeals for the Seventh Circuit in *In Re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, Nos. 79-1494, 79-1675, 79-1683, 79-1698 (7th Cir. Oct. 2, 1979), IT IS HEREBY ORDERED that:

1. Richard B. Ogilvie, as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is directed to embargo at 12:01 a.m., C.D.T., on November 1, 1979 all of the Debtor's freight operations on lines which are not shown on Appendix A, either as solid or dotted lines, nor listed on Appendix B, or Appendix C.

2. The Trustee shall notify the Interstate Commerce Commission of the possible need to direct service over the embargoed lines pursuant to 49 U.S.C. § 11125 and such other authority as the Commission may have and shall consult with the Commission with respect to measures for implementing such service.

3. The Trustee is authorized to file notices of proposed embargoes on all lines not shown on Appendix A, or

listed on Appendix B or Appendix C, or any other notices appropriate under the Interstate Commerce Act and to request the Interstate Commerce Commission and the Association of American Railroads to issue appropriate car service orders.

4. The Trustee shall continue all services and operations not embargoed by this Order and payments under all equipment obligations including leases. Order No. 1 and subsequent Orders in this proceeding shall remain in effect except to the extent that they are inconsistent with this Order.

5. As of November 1, 1979, or as soon thereafter as is practical, the Trustee shall furlough all employees not required for the services and operations continued under paragraph 1 or for the administration of the estate, the protection of the Debtor's property or the finalization, approval and implementation of a plan of reorganization. The Trustee shall suspend all payments and other benefits to furloughed employees pending the approval of a reorganization plan, except that the Trustee shall pay all furloughed employees for services performed up to the date of furlough at the rate at which payments were actually being made prior to the date of furlough and shall provide medical and dental protection to furloughed non-union employees in accordance with the Debtor's existing plan for the period of such protection provided therein.

6. The Trustee, as far as possible, shall prevent lines over which directed service is to be directed from becoming impassable and shall attempt to seek waivers from the Federal Railroad Administration of the necessity to comply with FRA minimum track standards where the track does not meet those standards.

ENTER:

THOMAS R. MCMILLEN
Thomas R. McMillen
Judge, U.S. District Court

DATED: October 26, 1979

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